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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR.
No. 539

PETITION OF PLAINTIFF IN ERROR FOR A REHEARING OF THE CASE.

Comes now Joseph Ralph Burton, plaintiff in error herein, and pursuant to leave of Court heretofore obtained, prays the Court for a rehearing of the above entitled cause, and as grounds of such petition states :

I.

The Court should have sustained the contention of plaintiff in error that section 1782,— the statute under which he was prosecuted,— was unconstitutional and void, and, in the consideration of the question, as disclosed by the opinion filed, would seem to have overlooked many important considerations relative to the validity of said statute.

II.

The Court did not consider and failed to pass upon important questions presented by the appeal and vitally affecting the question of the guilt or innocence of the plaintiff in error, viz:

1. There was a fatal variance between the indictment and the evidence, and there was no proof to sustain the charge of the indictment as to the services rendered by the defendant Burton.

The services are described alike in the sixth and seventh counts of the indictment as

"Consisting of his, the said Joseph Ralph Burton's appearing before the Post Office Department, and before the said Postmaster General, the Chief Post Office Inspector, and the Assistant Attorney General for said Post Office Department, and other officers of said Post Office Department, as an agent of and attorney for the said corporation, and obtaining information for said corporation concerning said proceeding in this count mentioned, in which the United States was then indirectly interested, *and by the influence of his presence and of his office as such Senator, and by statements, representations and persuasion inducing the said Postmaster General to believe that the said corporation was not conducting any such scheme to defraud as that last above mentioned, and to put a stop to any further investigation of the questions in this count mentioned by the said Post Office Department and by the said Postmaster General and to refrain from determining the same adversely to the interests of the said corporation,* etc., etc." (Rec. p. 13).

Here are two distinct charges, the one, of appearing before several different officers to obtain information, and

the other, of appearing before the Postmaster General, and only before him, and by the influence of personal presence, and by statements, representations and persuasions, inducing the Postmaster General to believe, etc.

The charge as to obtaining information shows no violation of the statute, nor was it submitted to the jury, so that in no event can that sustain the verdict or the judgment.

The sole issue presented by the indictment and submitted to the jury was that made by the charge that the defendant agreed to appear and did appear before the Postmaster General and induce him to believe, etc.

This charge and the issue presented thereby, was definite and specific, and must be sustained by the evidence, or the indictment must fail.

The only evidence involving the Postmaster General was that as to a transaction of January 24th, 1903, when the defendant called on Chief Inspector Cochran, and the two called on Assistant Postmaster General Bristow, and possibly the three, but in all probability only Cochran and Bristow, called on the Postmaster General.

But the transaction of this day confessedly had no relation to the business of the Rialto Company, and related exclusively to the recovery of the books of the Brooks Brokerage Company.

There was then an absolute failure of proof to support the only charge of the indictment as to services rendered by defendant for the Rialto Company.

If anything else shown to have been done by defendant constituted service to the Rialto Company, it was not the service described in the indictment, and so there was a fatal variance between the indictment and the evidence.

The question thus presented is not as to the sufficiency of the indictment, but is as to the support of the charge by the testimony.

The Court below therefore erred in not sustaining the motions to direct a verdict, made at the close of the Govment's case, and again at the close of the entire case, and also in its charge to the jury that as to this phase of the case the defendant was guilty, not if he rendered the specific service described in the indictment, but if he rendered any service before any officer of the Post Office Department. (Rec. p. 260).

2. The twelfth instruction asked by us should have been given.

It was:

"If the jury find from the evidence that the defendant was employed by the Rialto Grain and Securities Company by the month, at a salary of five hundred dollars per month, for a period of not less than five months, and that for the month covered by the payment of March 26th, 1903, he rendered no services in the Postal Department in any proceeding there pending looking to the issuance of a fraud order against the Company, then they should find the defendant not guilty on the third and seventh counts." (Rec. p. 267).

The testimony certainly warranted a finding by the jury that the employment was by the month. In any

event that was a matter for the jury to determine. And there was no testimony that any service was rendered after March 15th, 1903.

The employment of defendant by the Rialto Company was an employment to serve generally as counsel ; it was for service by the month, and for payment by the month. It begun in November, 1902, and ended in March, 1903.

If, in November, 1902, the defendant rendered service of the kind inhibited by the statute, and received compensation therefor in his November salary, he then and thereby incurred the penalty of the law, and was and is subject to prosecution and punishment in the proper jurisdiction.

But if never again the defendant rendered services of the kind inhibited, if everything done by him in December, January, February and March, and for which he was paid, was something which he might lawfully have done and accepted pay for, and this was for the jury to determine, the instruction asked should have been given, otherwise, for one act, from its nature constituting but one wrong, the defendant would be subjected to repeated punishments.

The offense charged in the seventh count has two incidents included in it, and they must co-exist or there is no offense, viz : rendering certain service and receiving compensation therefor. One of these is as essential as the other. There is no crime if either does not exist.

To yoke up the same identical incident of service with

the successive monthly payments, and make a separate offense of each month's receipt of payment, what is this but putting the defendant repeatedly in jeopardy for the same act ?

If only in one month the defendant rendered inhibited services, then only as to that month did the two incidents essential to constitute the offense co-exist, and for that month's transaction, and only for that month's transaction, was he subject to prosecution.

This principle involved, and which was violated by the refusal of our instruction, was declared in the case of Hans Nielsen, 131 U. S., 188, where the Court said :

"It seems to us very clear, that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of these incidents without being twice put in jeopardy for the same offense."

3. The various letters of complaint sent to the department by Houts, Evans, Allen, Warner and Fravel, and the accompanying circulars and booklets of the Rialto Company, should not have been read to the jury.

They were not needed to prove the pendency of a proceeding in the Department. Their sole effect was to disparage the Rialto Grain and Securities Company, and therefore to create prejudice against any man connected with the Company in any manner whatsoever.

The character of the Rialto Company and its business

was not involved in the case, and was held to be an immaterial issue. It was not open to defendant to rebut any presumptions arising from this testimony. He would not have been permitted to show that the letters were untrue, or that the circulars and booklets were never sent out by the Rialto Company, if such had been the fact.

There was no necessity for receiving any of this evidence, and there can be no justification for receiving this great mass of it. The evil effect of it was not and could not be prevented by the mere statement of the Court (Rec. p. 49) that it was admitted only to show the pendency of a proceeding and not to establish the truth of the matters recited.

Once in the case, it was used for every purpose, and, while wholly immaterial and irrelevant as to the vital issues of fact, and therefore incapable of proving anything, it is beyond question that with this mass of stuff out of the case, conviction would be impossible. It was admitted into the case as for one purpose only, but being in, was used for an entirely different purpose.

Taken in connection with the exclusion of evidence offered by defendant, to which we next call attention, there was a gross and grievous injustice done defendant.

4. The report of Inspectors Price and Piatt and the order or recommendation of Assistant Attorney General Robb in the proceeding against the Rialto Company should have been received in evidence. (Rec. pp. 216-226).

This, with what the Government offered and the Court admitted, made up the whole record of that proceeding.

The case of the Government against this defendant rested largely on inference, strained to a degree, and was predicated in large measure upon the fact that no fraud order was ever issued, and upon the assumption that such an order should have been issued. The argument was that a fraud order should have been issued, the defendant was about the Department while the matter was pending, no fraud order was issued, and therefore it is to be presumed that the defendant prevented its issuance.

Under these circumstances, we should have been permitted to complete the record of this proceeding. The letters of Houts and others, the circulars and booklets, were relied upon by the Government to show that a fraud order should have been issued, and that it did not in fact issue, was imputed to the interference of the defendant.

We desired to complete the record, and offered the report of Inspectors Price and Piatt and the order or recommendation of Assistant Attorney General Robb, which showed conclusively why no fraud order was issued, and that no interference by defendant was accountable therefor, but that law officers of the Government, not influenced by defendant in any way, never seen or spoken or written to by him, had advised that the case did not warrant a fraud order. We respectfully request consideration of the tenth head of our brief and argument in this connection.

Everything in the record of the "proceeding" before the Department, however irrelevant to the charge against the defendant, was admitted in evidence against him, and furnished the occasion for adverse argument and inference. Everything in the record of the "proceeding" favorable to him, everything which would refute the adverse argument and rebut the adverse inference was excluded.

5. The evidence of Hubner (Rec. 183-184) **should have been excluded.**

It was simply to the effect that defendant had an interview with Assistant Attorney General Tyner on December 1st, 1902.

The "proceeding" was not then and never was pending before that official. He never did anything with respect to it. There was no evidence that he had ever heard of it. There was no evidence that defendant said a word to him concerning it.

It was shown simply that in the routine course of business in the Department, this official, when a case was made up by the inspectors on the facts, examined it and made recommendation to the Postmaster General for or against the issuance of a fraud order.

The defendant could recall no such interview. But grant that there was one, can it be, under the circumstances, the basis of an inference that its purpose was an evil one, and the specific evil purpose charged in the indictment ?

General Tyner was not impeached by this record in

any way. He was, so far as here appears, and so far as we know, a man of fair fame and good name in December, 1902. The evidence of this interview, offered by the Government, objected to by us but nevertheless admitted by the Court, was used by the Government to supplement every lack of definite proof in the case.

Nothing was shown to have been done having any tendency to prevent the issuance of a fraud order in any of the interviews with Cochran, and so this interview with Tyner, dead when this case was tried and dead when first the interview was suggested as having taken place, was relied upon, and it was not possible for defendant to refute the awful imaginings of what occurred therein.

6. Against the objection of defendant, Inspector Cochran was permitted to testify (Rec. pp. 159 and 160) **that when in November, 1902, the defendant asked him whether any complaints had been received against the Rialto Company, he answered him as he would have answered any one else that a case had been made up, but that he gave him the names of the complainants "because he was a Senator of the United States."**

There is no pretense that the defendant urged his office as Senator as a reason for obtaining information which would have been denied to a private citizen.

There is no evidence in the record of any rule or usage of the Department, known to the defendant or un-

known to him, entitling a Senator to information which would be denied to any one else.

And there is not, and there cannot be, any reason for any such discrimination as that suggested.

A Senator has and can have no right to any information of the kind here involved, beyond any other citizen of the United States.

The inquiry elicited and the answer disclosed no *fact* which could bear on the guilt or innocence of the defendant. It revealed simply a state of mind on the part of the witness not made known to the defendant until the time of his trial.

But it was a grave reproach upon the defendant by the witness, and it was one the defendant could not repel. He could not say what was or was not the inner motive of the witness in giving him the information he did.

It was the legitimate function of the witness to state what occurred in the interview, and no more. It was not for the witness to characterize what was done or said as being good or evil. The facts must bear their own import.

But here the witness was permitted not simply to bear witness, but to make accusation against the defendant. And this, too, in a case which had been pronounced by four judges of this tribunal to be without foundation.

It was by the accumulation of matters like this, the secret thought of the witness, the unlimited because unproved possibilities of an interview with a man dead at

the time of trial the testimony not of what the defendant and the Rialto Company had done, testimony that was relevant to no real issue in the case, and yet was made to meet every emergency, that the defendant's conviction was accomplished. And the questions raised in connection with these matters are of the greatest importance in this case. They bear upon the issue of guilt or innocence, and this to the defendant means more than any legal or Constitutional question, and indeed that this issue of guilt or innocence may in every case, as far as human imperfections permit, be rightfully determined, is after all the paramount purpose of all our Laws and all our Constitutions.

III.

The matters hereinbefore suggested by the Court were not passed upon in the opinion. We pray also for a rehearing upon the first, third, fourth, fifth and seventh points made in our main brief, and also upon that made in our supplemental brief.

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The undersigned, attorneys for Joseph Ralph Burton,

do hereby certify that the above and foregoing application for a re-hearing is made in good faith, and not for delay, and that, in the opinion of counsel, it is well grounded in law and in fact.

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